89-728

No.

Supreme Court, U.S.
FILED
NOV 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FIRST UNITED METHODIST CHURCH
OF HYATTSVILLE,

Petitioner,

v.

UNITED STATES GYPSUM COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETER T. ENSLEIN
ASHCRAFT & GEREL
2000 L Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 783-6400

Counsel for Petitioner

CASILLAS PRESS INC. – 1717 K ST NW WASHINGTON DC 20036 – 223-1220

50 pp

QUESTION PRESENTED

Does Section 104(a)(3)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9604(a)(3)(B), which limits the United States Environmental Protection Agency's authority to respond to releases from products which are a part of the structure of buildings and result in exposure within buildings, also bar the application of CERCLA to private actions which seek to recover the costs of responding to such releases?

LIST OF PARTIES

First United Methodist Church of Hyattsville was the appellant in No. 88-1612 before the United States Court of Appeals for the Fourth Circuit.

United States Gypsum Company was the appellee in No. 88-1612.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

RELEVANT STATUTES 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

CONCLUSION 17

TABLE OF AUTHORITIES

Cases:

Burlington Northern R. Co. v. Oklahoma Tax Com., 481 U.S. 454 (1987) 14

Cadillac Fairview/California v. Dow Chemical Co., 840 F.2d 691 (9th Cir. 1988) 6, 12

County of Orange v. National Gypsum Co., *appeal docketed*, No. 89-2529 (5th Cir. May 26, 1989) 9

Davis v. Lukhard, 788 F.2d 973 (4th Cir.), *cert. denied sub nom. Stanton v. Lukhard*, 479 U.S. 868 (1986) 16

Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074 (1st Cir. 1986) 6, 11

Demby v. Schweiker, 671 F.2d 507 (D.C. Cir. 1981) 16

Idaho v. Howmet Turbine Component Co., 814 F.2d 1376 (9th Cir. 1987) 11

Page

Interchange Office Park v. Standard Industries, Inc.,
654 F. Supp. 166 (W.D. Tex. 1987).....11

Layne v. GAF Corporation, 42 Ohio Misc.2d 19,
537 N.E.2d 252 (C.P. Cuyahoga Ct. 1988).....13

Mississippi Power & Light Co. v. Moore,
487 U.S. ____, 108 S.Ct. 2428 (1988).....8

New York v. General Electric Co.,
592 F. Supp. 291 (N.D. N.Y. 1984).....11

Pennsylvania v. Union Gas Co.,
____U.S. ____, 109 S.Ct. 2273 (1989).....5, 7, 8, 13

Smith Land and Improvement Corp. v. Celotex Corp.,
851 F.2d 86 (3rd Cir. 1988), *cert. denied*, 109
S.Ct. 837 (1989).....6

*3550 Stevens Creek Associates v. Barclays Bank of
California, appeal docketed*, No. 88-15503
(9th Cir. Nov. 8, 1988) 9

United States v. Conservation Chemical Co.,
619 F. Supp. 162 (W.D. Mo. 1985).....10,11

United States v. Metate Asbestos Corp.,
584 F. Supp. 1143 (D. Ariz. 1989).....5

United States v. Nicolet,
712 F. Supp. 1193 (D. Pa. 1989).....13

*United States v. Northeastern Pharmaceutical &
Chemical Co.*, 579 F. Supp. 823 (W.D. Mo. 1984),
aff'd in part and rev'd in part on other grounds,
810 F.2d 726 (8th Cir. 1986), *cert. denied*,
108 S.Ct. 146 (1987).....10

United States v. Reilly Tar and Chemical Corp.,
546 F. Supp. 1100 (D. Minn. 1982).....10

Page

United States v. Southeastern Pennsylvania Transport Authority, 24 E.R.C. 1860 (E.D. Pa. 1986) 11

United States v. Wade, 577 F. Supp. 1326 (E.D. Pa. 1983) 11

Utah State Department of Health v. Ng, 649 F. Supp. 1102 (D. Utah 1986) 11

Walls v. Waste Resource Corp., 823 F.2d 977 (6th Cir. 1987) 11

Wickland Oil Terminals v. ASARCO, Inc., 792 F.2d 887 (9th Cir. 1986) 6, 12

Wilshire Westwood Associates v. Atlantic Richfield Corp., 881 F.2d 801 (9th Cir. 1989) 8

Statutes:

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601 *et seq.* ..... *passim*

Md. Cts. & Jud. Proc. Code Ann. § 5-108(a) 3

Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 ..... *passim*

28 U.S.C. § 1441 2

28 U.S.C. § 1254(l) 2

42 U.S.C. § 9607(i) 11

42 U.S.C. § 9607(j) 11

Page

Rules:

40 C.F.R. § 302.4 5

Fed. R. Civ. P. 54(b) 3

Other Authorities:

Attorney General's Asbestos Liability Report to the Congress (Sept. 1981) 13

Brief of the United States as Amicus Curiae filed Feb. 17, 1989 in *3550 Stevens Creek Associates v. Barclays Bank of California* 9

Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 Harv. J.L. & Pub. Pol'y 59 (1987) 14

EPA, *Extent of the Hazardous Release Problem and Future Funding Needs (CERCLA Section 301(a)(1)(C) Study)* (Dec. 1984) 10

Exec. Order No. 12316, 46 Fed. Reg. 42237 (1987) 12

House Conf. Rep. No. 962, 99th Cong., 2d Sess. 190 (1986) 16

Senate Rep. No. 11, 99th Cong., 1st Sess. (1985) 14

Starr, *Observations About the Use of Legislative History*, 1987 Duke L.J. 371 14

Superfund Improvement Act of 1985: Hearings on S.51 and S.494 Before the Senate Comm. on Environment and Public Works, 99th Cong., 1st Sess. 13 (1985) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No.

FIRST UNITED METHODIST CHURCH
OF HYATTSVILLE,

Petitioner,

v.

UNITED STATES GYPSUM COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

First United Methodist Church of Hyattsville petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 882 F.2d 862 and is reprinted in the appendix hereto ("App.") at 12a - 25a. The order and memorandum opinion of the United States District Court for the District of Maryland is unreported and is reprinted at App. 1a-11a.

JURISDICTION

The judgment of the United States Court of Appeals was entered on August 10, 1989. App. at 12a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTES

The pertinent provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, are Sections 104(a)(3) and 203(a), 42 U.S.C. §§ 9604(a)(3), 9658(a).

STATEMENT OF THE CASE

This is an asbestos property damage action brought by the petitioner, First United Methodist Church of Hyattsville (the "Church"), a nonprofit organization located in the State of Maryland, against respondent, United States Gypsum Company ("USG"), a manufacturer of asbestos-containing building products which is headquartered in Chicago, Illinois.

As originally pled, the Church's Complaint sought damages in tort and in contract because its building was contaminated by USG's asbestos-containing acoustical plaster. USG's plaster was installed in the Church during construction which was completed in 1962. In 1985, the building was inspected by an industrial hygienist and found to be contaminated by USG's product. The hygienist recommended its removal. The Church did so at a cost in excess of $225,000.00.

On June 15, 1989, the Church filed suit in the Circuit Court for Prince George's County, Maryland. The suit was thereafter removed by USG to the United States District Court for the District of Maryland, pursuant to 28 U.S.C. § 1441.

In the latter forum, USG filed a motion for partial summary judgment on all claims at issue here arising from the contamination of the Church's premises by asbestos-containing plaster, interposing Maryland's 20-year statute of repose as a complete defense, § 5-108(a) Md. Cts. & Jud. Proc. Code Ann. ("§ 5-108(a)"). The Church opposed this motion urging, *inter alia*, that the time limits of the Maryland statute are preempted Section 203(a) of CERCLA, 42 U.S.C. § 9658(a). The CERCLA provision establishes a uniform discovery statute of limitation for all state law property damage actions based on the release of a hazardous substance into the environment.

On October 13, 1988, the District Court granted USG's motion, and finding no just reason for delay, entered a final judgment pursuant to Fed. R. Civ. P. 54(b) as to all of the Church's claims at issue here.

On November 21, 1988, the Church filed its Notice of Appeal to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals heard argument on June 9, 1989 and, on August 10, 1989, affirmed the judgment of the District Court. The Court of Appeals ruled that CERCLA was not "intended to apply to recover costs incurred for removing asbestos products which are part of the structure of a building." App. at 20a. The court premised its holding on Section 104(a)(3) of CERCLA, 42 U.S.C. § 9604(a)(3). This provision, added to CERCLA as part of the Superfund Amendments and Reauthorization Act of 1986 (Pub. L. No. 99-499, 100 Stat. 1613) ("SARA") states in pertinent part:

> (3) Limitations on response
>
> The President shall not provide for a removal or remedial action under this section in response to a release or threat of release —

* * *

(B) from products which are part of the structure of, and result in exposure within, residential buildings or business or community structures;

* * *

(4) Exception to limitations

Notwithstanding paragraph (3) of this subsection, to the extent authorized by this section, the President may respond to any release or threat of release if in the President's discretion, it constitutes a public health or environmental emergency and no other person with the authority and capability to respond to the emergency will do so in a timely manner.

While recognizing that this limitation applies only to the President of the United States, the Court of Appeals concluded that "it would be anomalous indeed if Congress had seen fit to limit the President's authority to respond to a particular type of environmental hazard while placing no such limits on members of the general public." App. at 22a. As a result, the Court of Appeals declined to apply Section 203(a) of CERCLA rather than the Maryland statute of repose to the Church's claims, reasoning that Congress could not have intended Section 203(a) to preempt state law in an area beyond CERCLA's ambit. App. at 23a-24a.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision improperly limits the application of CERCLA to private cost recovery actions, subjecting them to a limitation which by its very terms applies only to federal government response actions and not to private actions. Moreover, the Court of Appeals' application of Section 104(a)(3) is: (1) contrary to the position of the United States

Environmental Protection Agency ("EPA") which is charged with the responsibility of enforcing CERCLA; and (2) in conflict with the interpretation of CERCLA by other federal courts. The Court should grant the petition for certiorari to clarify the application of CERCLA to private cost recovery actions.

1. The CERCLA Statutory Scheme

CERCLA was enacted to facilitate the prompt cleanup of hazardous substances by both federal and private remedial actions. To that end, CERCLA imposes strict liability: "The remedy the Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup." *Pennsylvania v. Union Gas Co.*, ____ U.S. ____, 109 S.Ct. 2273, 2285 (1989) (emphasis in the original).

CERCLA provides several separate but complementary devices to provide for cleanup, compensation and liability where there is a release or threat of release of a hazardous substance.[1] First, Section 104, 42 U.S.C. § 9604 authorizes the Federal Government to conduct its own removal or remedial actions, using money from the Superfund. Second, under Section 106 of CERCLA, 42 U.S.C. § 9606, the United States may compel responsible parties to undertake a cleanup. Third, Section 107, 42 U.S.C. § 9607, authorizes recovery of the costs of response actions either by the Federal Government or by private parties from the various liable parties, including present and past owners of a facility and generators

[1]Asbestos is clearly a hazardous substance subject to CERCLA. *See United States v. Metate Asbestos Corp.*, 584 F.Supp. 1143 (D. Ariz. 1989); 40 C.F.R. § 302.4 (1986) (listing asbestos among the hazardous substances in the EPA National Contingency Plan).

and transporters of hazardous substances.[2] Section 107(a) "expressly creates a private cause of action," which is "a remedy independent of governmental actions financed by Superfund." *Wickland Oil Terminals v. ASARCO, Inc.*, 792 F.2d 887, 890-92 (9th Cir. 1986). *Accord, Cadillac Fairview/California v. Dow Chemical Co.*, 840 F.2d 691, 693 (9th Cir. 1988).

A fundamental premise of CERCLA is that the massive problem posed by releases of hazardous substances into the environment cannot be addressed unless the limited public funds devoted to the Superfund are supplemented by private cleanup efforts, supported by private cost recovery actions. Thus, in *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986), the court noted that a liberal reading of the statute which eliminates procedural obstacles to private party recovery best comports with "congressional purposes by preserving the limited resources of the Fund . . . ." *See also, Smith Land and Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91-92 (3rd Cir. 1988), *cert. denied*, 109 S.Ct. 837 (1989) ("[t]he costs associated with cleanup must be absorbed somewhere. Congress has emphasized funding by responsible parties, but if they cannot be ascertained or cannot pay the sums necessary, federal monies may be used.").

The Court recently acknowledged that the purpose of CERCLA is best served by promoting private cleanup actions which in turn will preserve the much needed resources of the Superfund:

> Congress did not think it enough, moreover, to permit only the Federal Government to recoup the costs

[2]In some cases, Sections 111 and 112 of CERCLA allow private parties to recover response costs through claims against the Superfund. 42 U.S.C. §§ 9611, 9612.

> of its own cleanups of hazardous-waste sites; the Government's resources being finite, it could neither pay up front for all necessary cleanups nor undertake many projects at the same time. Some help was needed, and Congress sought to encourage that help by allowing private parties who voluntarily cleaned up hazardous-waste sites to recover a proportionate amount of the costs of cleanup from other potentially liable parties.

Union Gas Co., 109 S.Ct. at 2285.

2. The Court of Appeals' decision is in conflict with the position of the EPA.

Congress amended CERCLA in 1986 by passing SARA. SARA conserves the assets of the Superfund, assuring that the EPA can respond effectively to the most dire environmental emergencies while leaving to other persons the task of addressing the less immediate problems. The Senate testimony of EPA Administrator Lee M. Thomas in support of the limitations and exceptions provisions of the SARA amendments most cogently expresses this purpose:

> What we have tried to do, Senator, with this . . . is in fact narrowly define exclusions, . . . and not, in fact, draw very sharply down the number of sites that you have seen us deal with under Superfund to this point . . . . We are getting more and more inquiries, more and more suggestions, that [t]he breadth of the law as it currently exists makes Superfund an eligible source of funding for a wide, broad array of public works projects, all kinds of water system improvement projects, all kinds of individual home and housing projects. We are suggesting this [is] a very important provision. We feel we have worked long and hard to draft it narrowly but so that,

> prospectively, we can ensure that our focus and our funding is on those major problems of hazardous wastesites and hazardous substance releases which we think is the primary intent of the Superfund Program.

Superfund Improvement Act of 1985: Hearings on S.51 and S.494 Before the Senate Comm. on Environment and Public Works, 99th Cong., 1st Sess. at 13 (1985).

It is clear that the focus of 1986 CERCLA amendments was on claims involving the Superfund under Section 104(a) rather than, as the Court of Appeals characterized it, "a substantive limitation on the breadth of CERCLA itself." App. at 22a.

The Court of Appeals has improperly narrowed the breadth of CERCLA's application in private cost recovery actions, relying upon statutory language which by its terms applies only to federal government response actions under Section 104. This ruling curtails the authority Congress assigned to private parties in the cleanup of hazardous substances, authority recognized by this Court in *Union Gas Co.*

The EPA is charged with the primary responsibility for the enforcement of CERCLA. The EPA's interpretation of this statutory scheme, therefore, is to be accorded great weight to which the judiciary should defer. *See Mississippi Power & Light Co. v. Moore,* 487 U.S. ____, 108 S.Ct. 2428 (1988); *Wilshire Westwood Associates v. Atlantic Richfield Corp,* 881 F.2d 801, 808-810 (9th Cir. 1989) (EPA's interpretation of CERCLA's scope is "highly persuasive" and "should be accorded considerable deference.").

The EPA has taken precisely the same position as the Church with respect to: the scope of CERCLA; the meaning of the 1986 CERCLA amendments; and the distinction between permissible action by the Federal Government under

Section 104 as contrasted with acts by private parties under Section 107.

In *3550 Stevens Creek Associates v. Barclays Bank of California, appeal docketed*, No. 88-15503 (9th Cir. Nov. 8, 1988), the District Court dismissed a private action filed under Section 107(a)(4)(B) seeking recovery of response costs incurred in removing asbestos from a commercial building, holding that Section 104(a)(3) precluded such claims. In its amicus curiae brief filed in the pending appeal in *3550 Stevens Creek Associates*,[3] the EPA urged the reversal of this decision:

> The district court's ruling in this case unnecessarily limits private cost recovery actions brought under Section 107 by subjecting them to a limitation which by its terms applies only to federal government response action under Section 104. This ruling is contrary to the statutory language and fails to recognize the important independent role Congress assigned to private parties in the huge task of cleaning up hazardous substances across the nation.

Brief of the United States as Amicus Curiae filed February 17, 1989 in *3550 Stevens Creek Associates* at 7. Moreover, the EPA has reported to Congress that

> [d]uring the post-World War II period, materials containing asbestos were extensively used in the construction of schools, commercial and government buildings, and residences. These materials were often sprayed or trowelled onto ceilings, walls, and beams as a fire-retardant or as insulation. Spray-applied materials containing asbestos [*e.g.*, USG's

[3] *3550 Stevens Creek Associates* is scheduled for oral argument on November 14, 1989. CERCLA's application to private asbestos removal cost recovery actions is also at issue in *County of Orange v. National Gypsum Co., appeal docketed*, No. 89-2529 (5th Cir. May 26, 1989).

> acoustical plaster] are commonly friable (i.e., easily crumbled or pulverized) and can result in the release of asbestos fibers into the environment. Studies of exposure to asbestos in workplace settings have concluded that inhalation of asbestos fibers can lead to pulmonary cancer, mesothelioma, and fibrosis of the lung.

EPA, *Extent of the Hazardous Release Problem and Future Funding Needs (CERCLA Section 301(a)(1)(C) Study)*, at 5-12 (Dec. 1984). The context of the EPA's assertion implies that asbestos removal and recovery of the costs thereby incurred are matters squarely within the ambit of CERCLA.

3. The Court of Appeals' decision is in conflict with the construction of CERCLA by other federal courts, and it is contrary to the express terms of Section 104.

Liability under Section 107(a) is imposed "notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b)," 42 U.S.C. § 9607(a). It is well settled that "Section 107(a) was meant to stand by itself; liability under it can be determined without the numerous inquiries [into Section 104 and Section 111 limitations on Fund expenditures] suggested by the defendant." *United States v. Reilly Tar and Chemical Corp.*, 546 F.Supp. 1100, 1118 (D. Minn. 1982). Thus, for example, many courts have held that Section 104(c)(3), 42 U.S.C. § 9604(c)(3), which requires the EPA and a given state to enter into a cooperative agreement before proceeding with a Fund-financed response, is not a limitation on cost recovery actions under Section 107. *See, e.g., United States v. Conservation Chemical Co.*, 619 F.Supp. 162, 208-09 (W.D. Mo. 1985); *United States v. Northeastern Pharmaceutical & Chemical Co.*, 579 F.Supp. 823, 850 (W.D.

Mo. 1984), *aff'd in part and rev'd in part on other grounds*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S.Ct. 146 (1987); *New York v. General Electric Co.*, 592 F.Supp. 291, 303 (N.D. N.Y. 1984); *United States v. Wade*, 577 F.Supp. 1326, 1336 (E.D. Pa. 1983).

Similarly, courts have held that Section 112(a), 42 U.S.C. § 9612(a), which requires 60 days notice to the EPA before initiating a claim against Superfund, does not apply to cost recovery actions under Section 107(a). *Walls v. Waste Resource Corp.*, 823 F.2d 977, 979-981 (6th Cir. 1987); *Idaho v. Hownet Turbine Component Co.*, 814 F.2d 1376 (9th Cir. 1987); *Dedham*, 805 F.2d at 1076-1082; *Interchange Office Park v. Standard Industries, Inc.*, 654 F.Supp. 166, 169-170 (W.D. Tex. 1987); *Utah State Department of Health v. Ng*, 649 F.Supp. 1102, 1004-5 (D. Utah 1986); *United States v. Southeastern Pennsylvania Transport Authority*, 24 E.R.C. 1860, 1864 (E.D. Pa. 1986); *Conservation Chemical Co.*, 619 F.Supp. at 209-11.

The Court of Appeals' conclusory inference that limitations on Fund-financed actions under Section 104 must apply to private cost recovery actions under Section 107 is contrary to the language of Section 107. Moreover, the cases cited above demonstrate that Section 107 stands on its own. If Congress had meant to limit cost recovery for responding to releases of asbestos, it presumably would have addressed this specifically in Section 107 itself, as it did for certain releases of registered pesticides, 42 U.S.C. § 9607(i), and federally permitted releases, 42 U.S.C. § 9607(j).[4]

---

[4]Congress has also placed some limitations which apply to CERCLA as a whole in the definition section of the statute. *See, e.g.*, 42 U.S.C. § 9601(14) (defining "hazardous substance" for purposes of the statute to exclude "petroleum, including crude oil or any fraction thereof . . ."); 42 U.S.C. § 9601(22)(D) (defining "release" so as to exclude "the normal application of fertilizer").

The explicit language of Section 104(a)(3) confirms that this limitation in particular cannot apply to private actions under Section 107. This provision states that "the *President* shall not provide for a removal or remedial action *under this section*," in response to several categories of releases, including products which are part of the structure of buildings. 42 U.S.C. § 9604(a)(3) (emphasis added). By its terms, this limitation only applies to actions taken by the EPA under Section 104.[5]

This reading is reinforced by the language of Section 104(a)(4), which creates an exception to the bar of Subsection (a)(3) whenever the EPA determines in its discretion that the relevant release or threat of release "constitutes a public health or environmental emergency and no other person with the authority and capability to respond to the emergency will do so in a timely manner."

Furthermore, the last phrase of Subsection (a)(4) indicates that Congress expected that private parties would respond to the releases covered by Subsection (a)(3), thus preserving the Fund for emergencies where no other party could respond. There is no reason to think that Congress wanted to bar such responding private parties from recovering their costs. Such a bar would have been contrary to the obvious congressional desire to encourage private cleanups in order to preserve the Fund. *See Cadillac Fairview*, 840 F.2d at 694 (citing "CERCLA's broad remedial purpose to promote private enforcement actions 'independent of governmental actions financed by Superfund'" (quoting *Wickland*, 792 F.2d at 892)). Moreover, in his 1981 Report to Congress, the United States Attorney General stated that it was in the national interest that school districts faced with substantial asbestos removal

[5]The President has delegated his response authority under CERCLA generally to the EPA. Exec. Order No. 12316, 46 Fed. Reg. 42237 (1987).

costs have the ability to recover from the manufacturers which sold these products without warning of these hazards. *See Attorney General's Asbestos Liability Report to the Congress* (Sept. 1981) at iv-vii.

Indeed, the Court of Appeals overlooks the possible impact of its statutory interpretation: had asbestos conditions at the Church created "a public health or environmental emergency," Section 104(a)(4) would have empowered the EPA to expend Superfund monies to remedy this hazard. The EPA, in turn, could have brought suit against the Church to reclaim the government's removal costs. In such a circumstance, given the Court of Appeals' ruling, the Church would have no recourse against the persons responsible for the placement of the hazardous substance in its facility. This result is clearly contrary to CERCLA's aim which is that "*everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup." *Union Gas Co.*, 109 S.Ct. at 2285.

The Court of Appeals' construction effectively leaves CERCLA available only as a remedy for cleaning up asbestos dumps (*see, e.g., United States v. Nicolet*, 712 F.Supp. 1193 (D. Pa. 1989)), but prohibits CERCLA's application to the arguably more dangerous release of asbestos fibers in a contained "environment." *See Layne v. GAF Corporation*, 42 Ohio Misc.2d 19, 537 N.E.2d 252 (C.P. Cuyahoga Ct. 1988) (mesothelioma caused by asbestos fibers released into the air of an office building). In short, the Court of Appeals' interpretation of CERCLA discourages private cleanup efforts in dangerous buildings, making it more likely that Superfund monies will have to be spent under Section 104(a)(4)'s emergency exception.

4. The Court of Appeals' decision is in conflict with the legislative history of Section 104.

The plain, unambiguous language of the statute refutes the Court of Appeals' conclusion that the Church may not recover the cost of removing a hazard from its premises. Resort to the legislative history of CERCLA is therefore unnecessary. The Court observed in *Burlington Northern R. Co. v. Oklahoma Tax Com.*, 481 U.S. 454, 461 (1987):[6]

> Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity, but "[i]n the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive.'" United States v. James, 478 U.S. 597, 606 (1986) (quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)). Unless exceptional circumstances dictate otherwise, "[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete." Rubin v. United States, 449 U.S. 424 (1981).

The Court of Appeals, however, sees support for its ruling in the Senate Report on SARA. The Senate Report states (S. Rep. No. 11, 99th Cong., 1st Sess. 16-17 (1985)):

> CERCLA response authorities are extremely broad, but there are nevertheless situations, some of which may be life-threatening, which are not within the law's scope. The Agency has encountered some difficulties, primarily political, in restraining CERCLA responses to the scope of the law. For this reason, S. 51 proposes to make more explicit certain areas which the law does not cover.

---

[6] *See also* Starr, *Observations About the Use of Legislative History*, 1987 Duke L.J. 371; Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 Harv. J.L. & Pub. Pol'y 59 (1987).

> Specifically, S. 51 makes more clear the exclusion from remedial or removal action of a release or a threat of a release:
>
> * * *
>
> —from products which are part of the structure of, and result in exposure within a facility;
>
> * * *
>
> The Environmental Protection Agency has received requests to take removal or remedial action in situations where the contamination was from building materials used in the structure and was creating an indoor hazard. This section would clarify that such situations are not subject to remedial or removal action.
>
> * * *
>
> New subsection (b)(4) provides that, notwithstanding these exclusions, the President can provide remedial or removal action if the President believes that the release or threat of release constitutes a public health or environmental emergency and no other person with the authority and capability will respond in a timely manner.

While this report speaks loosely about situations which are "not within the law's scope," it is clear that the focus was on limiting the EPA's responsibility for responding to certain hazards in order to protect the Fund from political pressures to mount expensive responses to those hazards. There is absolutely no indication that the Committee intended to limit *private actions* under Section 107(a) for costs incurred in responding to a release of hazardous substances.

Significantly, the Conference Report on SARA contains none of the broad language one finds in the Senate Report. The Conference Report characterizes the Senate provision (which was

adopted) as follows (H. Conf. Rep. No. 962, 99th Cong., 2d Sess. 190 (1986)) (emphasis added):

> Section 112(b) prohibits the *President* from undertaking a response action *under section 104* in response to a release . . . from products which are part of the structure of residential buildings or businesses or community structures which result in exposure in such structures . . . . These limitations on response actions will not apply, however, if in the President's discretion the releases constitute a public health or environmental emergency and no other person with the authority and capability to respond will do so in a timely manner.

The Conference Committee thus did not contemplate that the limitations would apply to anyone besides the Federal Government acting under Section 104. The Conference Report must be accorded more deference than the Senate Report, "inasmuch as the conference report represents the final statement of terms agreed upon by both houses of Congress, [and] next to the statute itself, . . . is the most persuasive evidence of Congressional intent behind the enactment of a statute." *Davis v. Lukhard*, 788 F.2d 973, 981 (4th Cir.), *cert. denied sub nom. Stanton v. Lukhard*, 479 U.S. 868 (1986); *see also Demby v. Schweiker*, 671 F.2d 507, 510 (D.C. Cir. 1981).

The Court of Appeals' application of Section 104(a)(3) limits CERCLA's broad remedial purpose by discouraging private cleanup efforts and increasing the likelihood that Superfund monies will be tapped to pay for emergency cleanup of asbestos-contaminated buildings. This result is clearly contrary to the intent of Congress when it enacted CERCLA.

CONCLUSION

For the foregoing reasons, the Court should grant the writ and reverse the decision below.

Respectfully submitted,

Peter T. Enslein
ASHCRAFT & GEREL
2000 L Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 783-6400

Counsel for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FIRST UNITED METHODIST CHURCH OF HYATTSVILLE	:	
Plaintiff	:	
v.	:	CIVIL NO.
	:	JH-88-2030
UNITED STATES GYPSUM COMPANY	:	
Defendant	:	

ORDER

Upon consideration of United States Gypsum Company's motion for partial summary judgment, the plaintiff's opposition thereto, and defendant's reply, it is the opinion of this Court that the plaintiff's claims based on any improvement to its real estate that first became available for use on June 17, 1966 are barred by Maryland's Statute of Repose. Accordingly, it is this 13th day of October, 1988, by the United States District Court for the District of Maryland, ORDERED:

1. That defendant's motion for partial summary judgment BE, and the same hereby IS, GRANTED;

2. That plaintiff's claims against the defendant arising from improvements to plaintiff's realty prior to 1966 are barred by the Statute of Repose; and

3. That the Clerk mail copies of this Order to counsel of record.

/s/
Joseph C. Howard
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FIRST UNITED METHODIST CHURCH OF HYATTSVILLE	:	
Plaintiff	:	
v.	:	CIVIL NO.
	:	JH-88-2030
UNITED STATES GYPSUM COMPANY	:	
Defendant	:	

MEMORANDUM OPINION

Defendant in this action, United States Gypsum Company ("U.S. Gypsum"), moves this Court for partial summary judgment "with respect to all of plaintiff's claims based on any improvement to its real estate that first became available for its intended use before June 17, 1966." (Paper #14 at 1). The basis of this motion is defendant's claim that the action is barred by Maryland's Statute of Repose, Md. Cts. & Jud. Proc. Code Ann. § 5-108 (1984). This Court agrees. Because there is no genuine dispute as to any material fact, and U.S. Gypsum is entitled to judgment as a matter of law, summary judgment is granted with respect to all claims based on improvements prior to June 17, 1966. No hearing is necessary. Local Rule 6(B).

I.

Facts

Construction of the First United Methodist Church of Hyattsville ("United Methodist" or "the Church") began in 1961. (Complaint, para. 8). U.S. Gypsum was employed to supply asbestos-containing acoustical plaster for the ceilings

of the Church which was installed by Kidwell and Kidwell Corp., a plaster subcontractor. (Complaint, para. 11). In 1969, U.S. Gypsum again supplied a small amount of acoustical plaster as replacement material. (Complaint, para. 12).

United Methodist was unaware that U.S. Gypsum's acoustical plaster, Audicote, contained sprayed-on asbestos. (Plaintiff's Opposition, Exhibit 17, Affidavit of A. Hensel Fink). In 1985, Dennis J. Leebel, Chairman of the Board of Trustees of First United, retained Occupational Medicine Center, Inc. ("OMC") to inspect and test the Church for asbestos materials. (Plaintiff's Opposition, Exhibit 19, Affidavit of Dennis J. Leebel). OMC reported that it found friable sprayed-asbestos ceiling material in United Methodist and recommended its removal. (Leebel Affidavit, para. 6).

United Methodist originally filed suit against U.S. Gypsum in the Circuit Court for Prince George's County on June 17, 1988. The suit was subsequently removed to this Court and assigned to the Honorable Norman P. Ramsey, who transferred the case to the undersigned. United Methodist's complaint alleges three causes of action in tort (strict liability, negligence, fraud) and two in contract (breach of express and implied warranties). The complaint seeks money damages estimated at $225,000 for the removal of asbestos-containing materials in the Church building.

The parties have stipulated, for purposes of this motion, that the installation of the plaster ceilings in 1962 was part of the original construction of the Church building and that the building was first available for its intended use sometime in 1962. The parties have also stipulated that most of the material allegedly containing asbestos was installed in 1962 and that only a small amount of such material was involved in the 1969 repair referred to in paragraph 12 of the complaint. (Paper #12).

II.

U.S. Gypsum's Motion for Partial Summary Judgment

The basis for U.S. Gypsum's motion is that United Methodist's pre-1966 claims are barred by the Statute of Repose.[1] The pertinent section of this statute provides that "no cause of action for damages accrues . . . for damages incurred . . . to real or personal property resulting from the defective and unsafe condition of an improvement to real prop-

---

[1]In full, the Statute of Repose provides:

§ 5-108. Injury to person or property occurring after completion of improvement to realty.

(a) *Injury occurring more than 20 years later.* — Except as provided by this section, no cause of action for damages accrues and a person may not seek contribution or indemnity for damages incurred when wrongful death, personal injury, or injury to real or personal property resulting from the defective and unsafe condition of an improvement to real property occurs more than 20 years after the date the entire improvement first becomes available for its intended use.

(b) *Action against architect, professional engineer, or contractor.* — A cause of action for damages does not accrue and a person may not seek contribution or indemnity from any architect, professional engineer, or contractor for damages incurred when wrongful death, personal injury, or injury to real or personal property, resulting from the defective and unsafe condition of an improvement to real property, occurs more than 10 years after the date the entire improvement first became available for its intended use.

(c) *Three-year limitation after accrual of cause of action.* — Upon accrual of a cause of action referred to in subsections (a) and (b), an action shall be filed within three years.

(d) *Exception.* — This section does not apply if the defendant was in actual possession and control of the property as owner, tenant, or otherwise when the injury occurred.

(e) *When action accrues.* — A cause of action for an injury described in this section accrues when the injury or damage occurs.

(Ann. Code 1957, art. 57, § 20; 1973, 1st Sp. Sess., ch. 2, § 1; 1979, ch. 698; 1980, ch. 605).

erty [which] occurs more than 20 years after the date the entire improvement first becomes available for its intended use." Md. Cts. & Jud. Proc. Code Ann. § 5-108(a). U.S. Gypsum's product was installed in 1962; the improvement first became available for its intended use in 1962. First United filed suit on June 17, 1988, twenty-six years after the prescribed period. Accordingly, U.S. Gypsum argues, the suit is barred.

III.

Summary Judgment Generally

Before addressing the motion's merits, the Court believes it helpful to set out the general principles governing Rule 56 dispositions.

Summary judgment may be awarded:

> [A]gainst a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In ruling on a motion for summary judgment, the Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

Summary judgment is proper if the pleadings, depositions, answers to interrogatories and admissions on file, grouped with any affidavits, show there is no genuine issue of material fact.

In the typical summary judgment scenerio [sic] — where the moving party does not have the burden of proof on the material facts of trial — *Celotex* is helpful in determining the parties' initial Rule 56 burdens. The moving party must first

identify evidence which demonstrates the absence of a genuine issue of material fact regarding the nonmoving party's case. *Celotex*, 477 U.S. at 323. The Court has clarified what an opposing party may fairly be required to show to defeat the motion where it would have the burden of proof on the issue at trial. Thus, once the moving party has discharged its initial burden, the nonmoving party — who bears the burden of proof at trial — must go past the pleadings and isolate specific facts that show a genuine issue for trial. *Id.* at 324. The nonmoving party can oppose the motion with "any of the kinds of evidentiary materials listed in Rule 56(c) . . . ." *Id.* In that regard, the nonmoving party is entitled to the benefit of all favorable inferences and legal theories indicated by the evidence. If the nonmoving party fails to properly oppose the motion, the Court must enter judgment in favor of the moving party. *Id.* at 322-323.

III.

Application of the Statute to U.S. Gypsum

U.S. Gypsum's motion contains two central arguments: (1) the Statute of Repose applies to suppliers/manufacturers such as the defendant, and (2) the Statute is a substantive enactment of law which extinguishes a cause of action, in contrast to a statute of limitations which is merely a procedural bar to the availability of a remedy, and is therefore not subject to tolling.

A.

Cts. and Jud. Proc. § 5-108 Does Apply to Suppliers/Manufacturers

U.S. Gypsum can assert the defense of the Statute of Repose because the Maryland courts have extended this

defense to suppliers of an allegedly unsafe and defective product.

In *Whiting-Turner Contracting Co. v. Coupard*, 304 Md. 323, 499 A.2d 178 (1985), the Court of Appeals held that the Statute of Repose was constitutional in the face of an equal protection challenge, even though Subsection (b) of the Statute provided greater protection to architects and engineers than to suppliers or other persons under Subsection (a). (Subsection (b) only contains a ten-year limitation period for architects and engineers.) The Court found that "[t]he Legislature could view the liability exposure of the supplier to be less than that of an architect, because the former is in a better position than the latter to detect defects. 304 Md. at 356. The Court cited several cases from other jurisdictions which have extended the defense of a statute of repose to suppliers of materials or equipment. 304 Md. at 356-57.

Subsection (a) of § 5-108 is unique in that it contains no limiting language defining the class for which this section applies. In fact, only Maryland and the District of Columbia have enacted statutes with general provisions not limited to certain defendants or to certain activities. *J.H. Westerman Co. v. Fireman's Fund Ins. Co.*, 499 A.2d 116 at 121, n.4.

United Methodist's opposition contains no case law to refute the argument that § 5-108(a) is inapplicable to actions against suppliers and manufacturers. Rather, United Methodist cites to the legislative history of the Statute and cites the Governor's Commission Report No. 3F to the General Assembly. This 1973 report stated that § 5-108 protects only builders. The Court finds this unpersuasive in light of the Court of Appeals' decision in *Whiting-Turner, supra*.

First Methodist cites *Allentown Plaza Associates v. Suburban Propane Gas Corp.*, 43 Md. App. 337, 405 A.2d 326, 330

(1979), for the proposition that § 5-108 cannot be applied retrospectively. The Church argues that the acoustical plaster at issue was completed by 1962 but § 5-108 was not effective until January 1, 1974. The court in *Whiting Turner* rejected this argument as it applied to Subsection (b) of the Statute. Subsection (b), like Subsection (a), extinguishes a cause of action. Accordingly, this Court finds that Subsection (a) should also apply retrospectively.

B.

Maryland's Statute of Repose is a Substantive Enactment of Law and is not Subject to Tolling

U.S. Gypsum argues that since § 5-108 is a substantive enactment of law that extinguishes a cause of action, in contrast to a statute of limitations, which is merely a procedural bar to the availability of a remedy, § 5-108 is not subject to tolling.

Both this Court and the Fourth Circuit have concluded that § 5-108 is substantive law. *President and Directors, etc. v. Madden*, 505 F.Supp. 557 (1980), *aff'd*, 660 F.2d 91 (1981). In *Madden*, Judge Kaufman analyzed the District of Columbia's Statute of Repose, D.C. § 12-310. After deciding that the Maryland Court of Appeals would consider § 5-108 substantive, *id.* at 572, Judge Kaufman held "that the Court of Appeals of Maryland would view D.C. Code § 12-310 as a substantive grant of immunity." *Id.* at 575.

Although no court has held that § 5-108 can be tolled by fraud or concealment,[2] this Court takes guidance from a

[2]In *Geisz v. GBMC*, 313 Md. 301, 545 A.2d 658 (1988), the court held that Cts. & Jud. Proc § 5-203 [fraud tolling statute] was applicable to Maryland's wrongful death statute. However, the Court stated, "[w]e intimate no opinion as to the effect of § 5-203 on the medical malpractice statute of repose." *Id.* at 325, n.9.

recent opinion from the District of Columbia which held to the contrary. In *Wesley Theological Seminary v. U.S. Gypsum Co., et al.*, No. 85-1606, slip op. (D.C.D.C. Jan. 5, 1988), the Honorable Joyce Hens Green held that D.C. § 12-310, the D.C. Statute of Repose, is not tolled by concealment of the defects by defendants. Slip op. at 10, n.7. Moreover, the period runs *solely* from the date of the construction or improvement. *Id.*

Statutes of repose, unlike statutes of limitation which are normally procedural, provide a defendant complete and total relief upon the passage of time and are not dependent on any other action. The Eighth Circuit has recently held that Nebraska's Statute of Repose is not tolled by allegations of fraud.

> Because the injuries for which plaintiff seeks occurred *after* expiration of the ten-year period [provided by the statute of repose] plaintiffs could not have been fraudulently induced to postpone timely filing of their lawsuits. Thus, the theory of equitable tolling is unavailable under the circumstances of this case. [Emphasis in original.]

Peterson v. Fuller Co., 807 F.2d 151 at 153 (8th Cir. 1986). Since United Methodist claims its cause of action accrued in 1985 (plaintiff's opposition at 23), it was not fraudulently induced to postpone timely filing of its lawsuit.

United Methodist's opposition contains nothing that would demonstrate that there exists a genuine dispute as to a material fact. Plaintiff's opposition takes issue with the authority cited by U.S. Gypsum and nothing more. United Methodist states that § 5-108 is not a statute of repose because the statute itself and its legislative history lack this designation. (Opposition at 20). It also argues that if § 5-108 is a substantive enactment, the General Assembly would have codified it with other ex-

plicitly granted substantive immunities. *Id.* Although the typical rule provides that statutes of limitation are substantive only if: (1) the limitations period is set forth in the statute, and (2) the statute creates a cause of action, ***Madden I*** conclusively stated that the Maryland Court of Appeals would consider Maryland's Statute of Repose as substantive, 505 F.Supp. at 572, and this finding was upheld on appeal. 660 F.2d 91. This Court finds Methodist's arguments unavailing.

Finally, United Methodist argues that § 5-108 is preempted by the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601-9658. United Methodist argues that § 9658 requires the application of the federal discovery rule in cases involving property damage caused by hazardous substances. This Court disagrees. CERCLA is only triggered in an action involving the release of a hazardous substance into the environment or in ambient air, which has been defined as that portion of the atmosphere, external to buildings, to which the general public has access.[3] Therefore, United Method's [sic] preemption argument is misplaced.

Although an allegedly defrauded plaintiff should have his day in court, the General Assembly has responded to the problems arising from the expansion of liability based on defective and unsafe conditions of an improvement to real property. The legislature's response was the creation of Maryland's Statute

---

[3]40 C.F.R. § 50.1(e), definition of "ambient air" under the Clear [sic] Air Act. CERCLA does not define this term. However, this definition can be extrapolated from other regulations because the various federal environmental laws are often held to be *in pari materia*. *See, e.g., U.S. v. Shell Oil Co.*, 605 F. Supp. 1064 (D.C. Colo. 1985).

of Repose, which this Court finds applicable here. Accordingly, U.S. Gypsum's motion for partial summary judgment is granted. A separate order shall be issued.

/s/
Joseph C. Howard
United States District Judge

Date: October 13th, 1988

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 88-1612

FIRST UNITED METHODIST CHURCH OF HYATTSVILLE

Plaintiff-Appellant

v.

UNITED STATES GYPSUM COMPANY

Defendant-Appellee

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph C. Howard, District Judge. (C/A 88-2030-JH)

Argued: June 9, 1989 Decided: August 10, 1989

Before RUSSELL and HALL, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Peter Tyler Enslein (Michelle A. Parfitt, James M. Hanny, ASHCRAFT & GEREL on brief) for Appellant. George Albert Nilson (John E. Griffith, Jr., John A. Singer, PIPER & MARBURY; Thomas B. Kenworthy, MORGAN, LEWIS & BOCKIUS on brief) for Appellee.

HALL, Circuit Judge:

The First United Methodist Church of Hyattsville, Maryland ("First United") appeals the district court's grant of partial

summary judgment in favor of United States Gypsum Company ("USG") based on a Maryland statute of repose, § 5-108 Md. Cts. & Jud. Proc. Code Ann. Specifically, the district court held that the repose period of § 5-108(a) was not preempted by the Comprehensive Environmental Response and Compensation Act of 1980 ("CERCLA"), 42 U.S.C. § 9658. Finding no error, we affirm.

I.

In 1961, First United undertook construction of a new church building. At the direction of the building's architect, an asbestos-containing acoustical plaster, manufactured by USG, was applied to the building's ceilings. The church was consecrated on May 20, 1962, and has been in continuous use ever since. In 1969, a portion of the ceiling was replaced and asbestos-laden plaster was again used.

In July, 1985, First United became concerned over the possibility that asbestos materials may have been used in the construction of the church. In August, the presence of danger from the acoustical plaster was discovered and First United's Board of Trustees directed its removal from the building.

On June 15, 1988, First United brought suit against USG in Maryland state court alleging that the plaster posed a health hazard to those who frequently occupied the building. The Church sought to recover the cost of the removal of the plaster, an amount in excess of $225,000.00. USG removed the case to federal court without opposition.

First United's complaint advanced the state law theories of strict liability, negligence, breach of express and implied warranties, and fraud. On July 26, USG filed a motion for partial summary judgment on all claims arising from installation of the plaster which occurred before June 17, 1966, interposing

Maryland's 20-year statute of repose as a complete defense. § 5-108(a) Md. Cts. & Jud. Proc. Code Ann. On October 13, the district court granted the motion and, finding no reason for just delays, entered a final judgment pursuant to Fed. R. Civ. P. 54(b) as to all pre-1966 claims. This appeal followed.

II.

First United makes several arguments against the application of the statute of repose to its claims. The church's primary contention is that manufacturers are not in the class of persons protected by the statute. Alternatively, First United argues that even if the statute applies, USG's fraudulent concealment of the hazards of its plaster serve to toll the statute's running. Finally, the church argues that the time limits of § 5-108, as applied to its claims, have been preempted by CERCLA's § 9658, which establishes a uniform statute of limitations for all state law property damage actions based on the release of any hazardous substance into the environment. We address these arguments in turn.

The statute of repose reads in pertinent part:

> ***§ 5-108. Injury to person or property occurring after completion of improvement to realty.***
>
> (a) *Injury occurring more than 20 years later.* — Except as provided by this section, no cause of action for damages accrues and a person may not seek contribution or indemnity for damages incurred when wrongful death, personal injury, or injury to real or personal property resulting from the defective and unsafe condition of an improvement to real property occurs more than 20 years after the date the entire improvement first becomes available for its intended use.

First United bases its narrow reading of this broad grant of immunity on a passage from the statute's legislative history that characterizes the statute as protecting "builders, contractors, landlords, and realtors." *See Allentown Plaza Associates v. Suburban Propane Gas Corp.*, 43 Md. App. 337, 342-44, 405 A.2d 326 (1979) (discussing the Revisor's Note to § 5-108). According to First United's argument, because USG as manufacturer of the plaster does not fit into one of these categories, it cannot have benefit of the statute. We do not agree.

While a statute's legislative history is often helpful in resolving ambiguity one of the time-honored maxims of statutory construction is that when the language of a statute is clear, there is no need to rely on its legislative history. *Ex Parte Collett*, 337 U.S. 55, 61 (1949). Such is the case here. This statute unequivocally states that "no cause of action for damages accrues" after the 20-year time limit. And, it is completely silent as to any limitation on the class of persons it protects. To remove manufacturers from the ambit of § 5-108(a) as First United suggests, would be flatly inconsistent with this language's plain mandate. We are not alone in reaching this result.

In *J.H. Westerman Co. v. Fireman's Fund Ins. Co.*, 499 A.2d 116 (D.C. App. 1985), the District of Columbia court was forced to construe its nearly-identical statute of repose. In concluding that manufacturers were covered by the statute, the court reasoned that this language creates an immunity which turns on the defendant's connection to the improvement rather than on the type of service the defendant rendered or product it provided. *Id.* at 120. We find this reasoning persuasive and hold that § 5-108(a) works to insulate from liabili-

ty manufacturers of products used in improvements made to real property.[1]

III.

First United next contends that even if § 5-108(a) applies, USG's fraudulent concealment of the hazards of its plaster tolls the time limits of the statute.[2] We disagree.

The common law principle of equitable tolling of limitations periods has been codified in Maryland:

> If a party is kept in ignorance of a cause of action by the fraud of an adverse party, the cause of action shall be deemed to accrue at the time when the party discovered, or by the exercise of ordinary diligence should have discovered the fraud. (An. Code 1957, art. 57, § 14; 1973, 1st Sp. Sess., Ch. 2, § 1)

§ 5-203 Md. Cts. & Jud. Proc. Ann.[3] As the language of this provision indicates, it is intended to give relief to victims of fraud by tolling the time of accrual of a cause of action for purposes of an applicable statute of limitations. *E.g., Butcher v. Robertshaw Controls Co.*, 550 F. Supp. 692, 703 (D. Md. 1981). However, as the Maryland courts have repeatedly

[1]*See also* Whiting-Turner Contracting Co. v. Coupard, 304 Md. 340, 349, 499 A.2d 178 (1985) (court in dicta commented that statute protects "suppliers of building materials").

[2]Predictably, USG argues that First United's lack of due diligence, not USG's fraud, was the reason that this action was not timely filed. This, of course, is the quintessential question of fact in fraudulent concealment cases; however, our disposition of this issue obviates any need for its resolution.

[3]The statute has recently been amended, however, the amendment is not applicable "to any actions arising from events occurring before July 1, 1987," and thus has no effect on the instant dispute. See § 2, Ch. 592, Acts 1987.

recognized, § 5-108 is a statute of repose, not a statute of limitations, and the time of accrual has been set by the Maryland General Assembly. *Hilliard & Bartko Joint Venture v. Fedco Systems, Inc.*, 309 Md. 147, 159, 522 A.2d 961 (1987); *Whiting-Turner*, 304 Md. at 350; *Allentown Plaza*, 43 Md. App. at 338 n.2; *see also President and Directors, of Georgetown College v. Madden*, 505 F.Supp. 557, 571 (D. Md. 1980). These are meaningful distinctions.

A statute of limitations is a procedural device that operates as a defense to limit the remedy available from an existing cause of action. *Goad v. Celotex Corp.*, 831 F.2d 508, 511 (4th Cir. 1987), *cert. denied*, 108 S.Ct. 1871 (1988). A statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time. *Id.* Statutes of limitations are motivated by considerations of fairness to defendants and are intended to encourage prompt resolution of disputes by providing a simple procedural mechanism to dispose of stale claims. *Hariq v. Johns-Manville Products Corp.*, 284 Md. 70, 75, 394 A.2d 299 (1978). Statutes of repose are based on considerations of the economic best interests of the public as a whole and are substantive grants of immunity based on a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists. *Whiting-Turner*, 304 Md. at 349-50. Thus, as a general rule, a statute of limitations is tolled by a defendant's fraudulent concealment of a plaintiff's injury because it would be inequitable to allow a defendant to use a statute intended as a device of fairness to perpetrate a fraud. Conversely, a statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body. *Knox v. AC&S, Inc.*, 690 F. Supp. 752, 759 (S.D. Ind. 1988).

These general principles counsel that we should not lightly disturb the Maryland General Assembly's judgment on the time limit set by § 5-108(a). We recognize, as the Maryland court has recognized, the unique public policy concerns embodied in the 20-year repose period:

> [The statute is] a response to the problems arising from the expansion of liability based on the defective and unsafe condition of an improvement to real property. . . . If a legislative body concludes that it will address the problem of expanded liability . . . it must balance the interests of those potentially subject to liability, of those directly suffering Injury, and of the public in having improvements built safely and at a reasonable cost.

Whiting-Turner, 304 Md. at 349-50.

Further, it appears that a purpose of the statute was to inextricably tie the accrual of a property damage action to the date an improvement was placed into use precisely because tolling mechanisms, such as the one urged by First United, had expanded the liability of potential defendants. *Id.* at 349. Lastly, we note that had the Maryland General Assembly desired that § 5-203 apply to § 5-108, it could have expressly provided so as it has done in the medical malpractice arena. See § 5-109(f)(2) Md. Cts. & Jud. Code Ann. (amended in 1987 to show the applicability of § 5-203). In view of these considerations, it would be inappropriate for us to construe § 5-108(a) to provide for anything other than the 20-year repose period Maryland's lawmakers have chosen and consequently, we hold that § 5-203 does not operate to toll that period.[4]

---

[4]*See* Glenn v. Morelas, 79 Md. App. 90, 555 A.2d 1064 (1989) (court refused to recognize fraud tolling exception to § 5-109 prior to its amendment).

IV.

Lastly, we turn to First United's claim that § 5-108's repose period cannot preclude this action because it has been preempted by § 9658 of CERCLA. We cannot agree.

In relevant part § 9658 states:

> (a) State Statutes of Limitations for Hazardous Substance Cases
>
> (1) Exception to State Statutes
>
> In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any ***hazardous substance***, or pollutant or contaminant, ***released into the environment*** from a ***facility***, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute. . . .
>
> (b)(4) Federally Required Commencement Date
>
> (a) In General
>
> Except as provided in subparagraph (B), the term "federally required commencement date" means the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(l) were caused or contributed to by the hazardous substance or pollutant or contaminant concerned. . . .
>
> (i) The terms used in this section shall have the same meanings as when used in subchapter I of this chapter. (emphasis added).

First United argues that because — (1) asbestos is unquestionably a hazardous substance, *see Knox*, 690 F. Supp. at 755; (2) the church building falls within the broad definition of a "facility" codified at 42 U.S.C. § 9601(9); and (3) the escape of asbestos fibers from USG's plaster falls within the scope of the phrase "release into the environment" as the terms "environment" and "release" are defined in 42 U.S.C. § 9601(8), (22)[5] — it must follow that the time limits of § 5-108(a), which extinguished this action even before the church knew that it existed, must give way to the "federally required commencement date" of 42 U.S.C. § 9658. This argument fails to persuade because the premise on which it rests — that CERCLA is intended to apply to recover costs incurred for removing asbestos products which are part of the structure of a building — is unsound.[6]

We acknowledge that CERCLA, as all remedial statutes, must be given a broad interpretation to affect its ameliorative goals. *United States v. Motollo*, 605 F.Supp. 898, 902 (D. N.H. 1985). We also recognize that the statute reaches far more than hazardous waste sites; in fact, it has been said that through CERCLA, "Congress sought to deal with every conceivable area where hazardous substances come to be located. . . ." *State of N.Y. v. General Elec. Co.*, 592 F.Supp. 291, 296 (N.D. N.Y. 1984). However, to infer that Congress,

---

[5]This proposition in First United's syllogism is by no means a given. *See Knox*, 690 F. Supp. at 757 (defining "release" in terms of "spills and disposals of wastes"); Covalt v. Carey Canada Inc., 860 F.2d 1434 (7th Cir. 1988) (§ 9658 does not preempt state law because interior of workplace is not "environment" for purposes of asbestosis suit based on work place exposure).

[6]We emphasize that our holding is limited to the facts at hand, that is to claims for the cost of removing asbestos from the structure of a building, that was installed as part of that structure, and that creates a hazard only within that building. We express no opinion as to the validity under CERCLA of any other genre of asbetos actions.

by enacting CERCLA, intended to preempt state statutes of repose as applied to private asbestos-removal actions, is to stretch the statute far beyond its intended reach. We need look no further than the language of the statute to reach this conclusion.

In 42 U.S.C. § 9604(a)(3), Congress limited the President's authority to respond to the asbestos-removal problem:

> The President shall not provide for a removal or remedial action under this section in response to a release or threat of release . . .
>
> (B) from products which are part of the structure of, and result in exposure within, residential buildings or business or community structures; . . .[7]

First United argues that this limitation on the President's authority to act in no way limits the scope of § 9658 because cost recovery actions brought by private parties typically are not subject to the procedural requirements placed on similar actions brought by the government.[8] *See U.S.* [*v.*] *Conservation Chemical Co.*, 619 F.Supp. 162, 208-209 (W.D. Mo. 1985) (§ 9604(c)(3) requirement of cooperative agreement before proceeding with a response not applicable to private cost recovery actions under § 9607); *Walls v. Waste Resource Corp.*, 823 F.2d 977, 979-981 (6th Cir. 1987) (60 day notice requirement of § 9612(a) not applicable). We do not dispute

---

[7]This limitation is subject to exception if, in the President's discretion, he determines that such a situation "constitutes a public health or environmental emergency and no other person with the authority and capability to respond to the emergency will do so in a timely manner." 42 U.S.C. § 9604(a)(4).

[8]USG makes the counter-argument on this point that since First United has not pleaded a cause of action under CERCLA, it cannot avail itself of the preemptive effect of § 9658. See *Knox*, 690 F. Supp. at 757-58. Because we decide that CERCLA does not preempt § 5-108(a), we need not reach this issue.

this general rule; however, it would be anomalous indeed if Congress had seen fit to limit the President's authority to respond to a particular type of environmental hazard while placing no such limits on members of the general public. To resolve this ambiguity we turn to the provision's legislative history. There, it is made clear that § 9604(a)(3)(B) represents much more than a procedural limitation on the President's authority; instead, it is a substantive limitation of the breadth of CERCLA itself.

Section 9604(a)(3) originated as § 112(b) of Senate Bill 51, which was the Senate's version of the Superfund Amendments and Reauthorization Act of 1986. P.L. 99-499, 100 Stat. 1613 ("SARA"). *See Retirement Community Developers, Inc. v. Merine*, 57 U.S.L.W. 2699 (D. Md. May 17, 1989). The Senate Report accompanying this section stated, under a heading entitled *Clarifying the program's scope*, that:

> CERCLA response authorities are extremely broad, but there are nevertheless situations, some of which may be life-threatening, which are not within the law's scope. The Agency [Environmental Protection Agency] has encountered some difficulties, primarily political, in restraining CERCLA responses to the scope of the law. For this reason, S. 51 proposes to make more explicit certain areas which the law does not cover.
>
> Specifically, S. 51 makes more clear the exclusion from remedial or removal action of a release or a threat of a release:
>
> . . .- from products which are part of the structure of, and result in exposure within a facility. . . .
>
> The Environmental Protection Agency has received requests to take removal or remedial action in situations where the contamination was from

> building materials used in the structure and was creating an indoor hazard. This section would clarify that such situations are not subject to remedial or removal action.

S. Rep. No. 11, 99th Cong., 1st Sess. 16-17 (1985). Although the compromise bill eventually passed as SARA was not Senate Bill 51, the exact language of § 112(b) as proposed by the Senate was adopted. H.R. Conf. Rep. No. 962, 99th Cong. 2nd Sess. 190 (1986) *reprinted in* 1986 U.S. Code Cong. & Admin. News 3276, 3283. Thus, the Senate Report remains an authoritative guide to interpreting this provision.[9] In view of this clear expression of Congressional intent, we will not expand CERCLA to encompass asbestos-removal actions.[10]

Having drawn this conclusion, it follows naturally that § 9658 does not preempt § 5-108(a) as applied to asbestos-removal actions. Congress could not have intended for § 9658 to preempt state law in an area which CERCLA's legislative

---

[9]First United contends that the Conference Report's characterization of § 112(b) supports its view that the section limits only the President's authority to act. While the Conference Committee's brief explanation of § 112(b) does not discuss the substantive limits the provision is intended to effect, the Committee expressly adopted the Senate's provision without stating that the Committee intended to modify its original meaning in any way. H.R. Conf. Rep. No. 962, 99th Cong. 2nd Sess. 190 (1986) *reprinted in* 1986 U.S. Code Cong. & Admin. News 3276, 3283. Consequently, we conclude that the Senate's explanation of § 112(b) remains viable.

[10]*But see* Prudential Ins. Co. of America, et al v. U.S. Gypsum, et al., 1989 Dist. Lexis 3791 (D. N.J. March 28, 1989). In a CERCLA asbestos-removal action, the district court held that the plaintiffs did not state a CERCLA claim because the sale of asbestos building materials was not a "disposal" of a hazardous substance as defined by CERCLA. However, the court went on, in dicta, to comment that it believed that the limits of § 9604(a)(3) did not apply to private asbestos removal actions. With this dictum we respectfully disagree.

history expressly places outside "the scope of the law."[11] To conclude otherwise would be contrary to the principles of comity which demand that in our federal system, state law not be preempted unless it is the "clear and manifest purpose of Congress." *Baker, Watts & Co. v. Miles & Stockbridge*, No. 88-1134/1135 (4th Cir. June 7, 1989) (en banc), Slip Op. at 14 (quotation omitted).

In closing, we note that this interpretation of CERCLA fully comports with the most fundamental guide to statutory construction — common sense. To extend CERCLA's strict liability scheme to all past and present owners of buildings containing asbestos as well as to all persons who manufactured, transported, and installed asbestos products into buildings, would be to shift literally billions of dollars of removal cost liability based on nothing more than an improvident interpretation of a statute that Congress never intended to apply in this context.[12] *Merine*, at 2699. Certainly, if Congress had intended

---

[11]A report to Congress on the intended effect of § 9658 supports this reasoning:

> The remedies discussed in this report are legal remedies for personal injury, environmental damages and reduction of property value resulting from the spills of hazardous substances and disposal of hazardous wastes *for which CERCLA provides cleanup and remedial activities*. (emphasis added).

Injuries and Damages from Hazardous Wastes — Analysis and Improvement of Legal Remedies; A Report to Congress in Compliance with Section 301(e) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 97th Cong. 2d Sess.

[12]It is for this reason, that Congress simply did not intend for CERCLA to remedy the asbestos-removal problem, that we decline to follow the reasoning of *Prudential*, *Knox* and *Covalt* in rejecting First United's preemption argument. Instead of recognizing the fact that CERCLA is out of context in this situation, these courts rejected similar attempts to invoke the statute by construing CERCLA's key terms in a way to exclude asbestos-removal actions. *Covalt*, 860 F.2d at 1438-39 (defining "environment" to exclude the interior of a workplace); *Knox*, 690 F.Supp. at 756-57 (defining "release" in terms of "spills" or "disposal"); *Prudential*, 1989

for CERCLA to address the monumental asbestos problem, it would have said so more directly when it passed SARA. In fact, the only mention of this problem in SARA's legislative history that either party has raised, or that this Court has found on its own, points to Congress' intent to the contrary. While CERCLA is unquestionably a far-reaching remedial statute that must be interpreted with an eye toward this nation's environmental problems, it cannot reasonably be interpreted to encompass the asbestos-removal problem. Accordingly, we affirm the district court's holding that § 9658 does not preempt § 5-108(a).

V.

In sum, we hold that § 5-108(a) protects manufacturers of goods used in improvements to real property and that the 20-year repose period of § 5-108(a) is not subject to the tolling provision of § 5-203. We also hold that because CERCLA does not authorize response cost recovery actions for removal of asbestos from the structure of a building, § 9658 of CERCLA does not preempt the repose period of 5-108(a). Accordingly, we affirm the district court's ruling that all of First United's pre-1966 claims are barred.

AFFIRMED.

Dist. Lexis at 29-31 (defining "disposal" to exclude the sale of a product for consumer use). We find this analysis unsatisfactory because it runs the risk of unnecessarily restricting the scope of CERCLA merely to dispose of claims that the statute was never intended to encompass in the first place. It is far better to simply acknowledge the inapplicability of CERCLA to asbestos-removal claims than to restrict its operative terms.

No. 89-728

(2)

Supreme Court, U.S.
FILED
JAN 18 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FIRST UNITED METHODIST CHURCH OF HYATTSVILLE,
Petitioner,

v.

UNITED STATES GYPSUM COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF RESPONDENT UNITED STATES GYPSUM COMPANY IN OPPOSITION

THOMAS B. KENWORTHY *
MORGAN, LEWIS & BOCKIUS
2000 One Logan Square
Philadelphia, PA 19103
(215) 963-5702

GEORGE A. NILSON
PIPER & MARBURY
1100 Charles Center South
Baltimore, MD 21201
(301) 539-2530

Attorneys for Respondent United States Gypsum Company

* Counsel of Record

January 18, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether a state statute of repose is preempted by 42 U.S.C. § 9658, which addresses state statutes of limitations?

2. Whether the courts below erred in concluding that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) 42 U.S.C. § 9601 *et seq.*, *as amended*, was not intended to cover the removal from buildings of an installed useful product, a minor constituent of which was asbestos?

3. Whether the enactment of 42 U.S.C. § 9658 so as to partially preempt state statutes of limitations for state law causes of actions is violative of the Tenth Amendment to the United States Constitution?

4. Whether a statute of repose, which grants a substantive right to be free from stale lawsuits, may be preempted retroactively to revive potential liabilities that the statute had expressly extinguished?

LIST OF INTERESTED PARTIES

The following parties appeared before the United States Court of Appeals for the Fourth Circuit in the proceedings below:

First United Methodist Church of Hyattsville
United States Gypsum Company

USG Corporation is the parent company of United States Gypsum Company. The following corporations are non-wholly-owned affiliates of respondent United States Gypsum Company:

American Metals Corporation
BHI International, Inc.
C-S-W Drywall Supply Company
C.N.G. Distribution Limited
CGC Inc.
CIKSA, S.A. de C.V.
Construcciones, Recubrimientos
Y Acabados S.A. de C.V.
DAP Canada
DAP Inc.
Darswan, Inc.
Donn Australia
Donn Canada Ltd.
Donn Far East SDN BHD
Donn France S.A.
Donn International, Inc.
Donn International Sales Corp.
Donn Pacific Ltd.
Donn Products (U.K.) Ltd.
Donn Products GmbH
Donn South Africa (Pty) Limited
Gypsum Communications Co.
Gypsum Energy Management Co.
Gypsum Transportation Ltd.
L & W Supply Corporation
Little Narrows Gypsum Co.

Marstrat, Inc.
North Baldwin Park Corp. (formerly Hollytex)
101 South Wacker Co.
Panama Gypsum Company, Inc.
Panama Wallboard, Inc.
Sequoyah Carpet Corp.
Stocking Specialists, Inc.
USG Enterprises, Inc.
USG Foreign Investments, Ltd.
USG Foreign Sales Corp.
USG Industries, Inc.
USG Interiors, Inc.
USG International, Ltd. (DISC)
USG Properties, Inc.
United States Gypsum Export Company
Westbank Planting Company
Westlake Land (Canada) Ltd.
Windsor Shipping Limited
Wiss, Janney, Elstner Associates, Inc.
Yeso Mexicano S.A.
Yeso Panamericano, S.A. de C.V.
Yesomet, S.A. de C.V.

RULE 29.4 STATEMENT

If, as Petitioner urges, the provisions of 42 U.S.C. § 9658 are apposite to this case, 28 U.S.C. § 2403(a) may be applicable. No court of the United States, as defined by 28 U.S.C. § 451, has certified to the Attorney General the fact that the constitutionality of an Act of Congress may be drawn into question.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF INTERESTED PARTIES	ii
RULE 29.4 STATEMENT	iii
TABLE OF AUTHORITIES	vi
STATUTES IN QUESTION	1
STATEMENT OF THE CASE	3
REASONS WHY THE PETITION SHOULD BE DENIED	6
I. THE QUESTION PRESENTED FOR REVIEW AS FRAMED BY FIRST UNITED IS NOT RAISED IN THIS CASE	6
II. THE CERCLA RELATED QUESTION THAT IS PRESENTED BY THIS CASE DOES NOT WARRANT REVIEW BY THIS COURT	6
III. THE QUESTION OF WHETHER THE SCOPE OF CERCLA INCLUDES THE REMOVAL OF INSTALLED ASBESTOS-CONTAINING PRODUCTS IN BUILDINGS IS NOT RIPE FOR REVIEW BY THIS COURT	8
IV. THIS COURT SHOULD NOT ACCEPT A CASE TO REVIEW THE SCOPE OF CERCLA WHERE SUBSTANTIAL COLLATERAL CONSTITUTIONAL ISSUES WILL BE IMPLICATED	9
CONCLUSION	11
APPENDIX	
Complaint	1a

TABLE OF AUTHORITIES

CASES — Page

Board of Regents v. Tomanio, 446 U.S. 478 (1980) 10

Corporation of Mercer University v. Nat'l Gypsum Co., 24 Envt. Rep. Cas. (BNA) 1953 (M.D.Ga. 1986) 9

Covalt v. Carey Canada, Inc., 860 F.2d 1434 (7th Cir. 1988) 8

Dayton Independent School District v. U.S. Mineral Products Co., Civil Action No. B-87-507-CA (E.D. Tex., March 11, 1989) (appeal pending) .. 9

Felder v. Casey, 108 S. Ct. 2302 (1988) 10

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 10

Hilliard & Bartko Joint Venture v. Fedco Systems, Inc., 309 Md. 147, 522 A.2d 961 (1987) 5

Prudential Ins. Co. of America v. U.S. Gypsum, 711 F. Supp. 1244 (D.N.J. 1989) 8

Retirement Community Developers, Inc. v. Merine, 713 F. Supp. 153 (D.Md. 1989) 8

School Bd. of Norfolk v. U.S. Gypsum, Civil Action No. 86-450-N (Unpublished Bench decision, E.D. Va., Nov. 3, 1986) 9

School Bd. of Norfolk v. U.S. Gypsum, 234 Va. 32, 360 S.E.2d 325 (1987) 10

Sun Oil Co. v. Wortman, 108 S. Ct. 2117 (1988) 9, 10

3550 Stevens Creek Associates v. Barclays Bank of California, Civil Action No. C-87-20672-RPA (Unpublished Slip Op., N.D. Cal., Sept. 28, 1988) (appeal pending) 8, 9

William Danzer & Co. v. Gulf & Ship Island R.R., 268 U.S. 633 (1925) 10

Wilson v. Garcia, 471 U.S. 261 (1985) 10

STATUTES

28 U.S.C. § 1441(a) 4

42 U.S.C. § 9604(a)(3) 6

42 U.S.C. § 9607 6

42 U.S.C. § 9658 ..... *passim*

Md. Cts. & Jud. Proc. Code § 5-108 ..... *passim*

TABLE OF AUTHORITIES—Continued

RULES OF COURT

	Page
Fed. R. Civ. P. 54 (b)	5
Former Supreme Court Rule 21	6, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-728

FIRST UNITED METHODIST CHURCH OF HYATTSVILLE,
Petitioner,

v.

UNITED STATES GYPSUM COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF RESPONDENT UNITED STATES GYPSUM COMPANY IN OPPOSITION

Respondent United States Gypsum Company respectfully submits this Brief in Opposition to the Petition of First United Methodist Church of Hyattsville for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the judgment of the United States District Court for the District of Maryland.

STATUTES IN QUESTION

The state statute upon which judgment was entered in favor of United States Gypsum Company was the applicable Maryland statute of repose, Md. Cts. & Jud. Proc. Code § 5-108(a):

§ 5-108. Injury to person or property occurring after completion of improvement to realty.

(a) Injury occurring more than 20 years later—Except as provided by this section, no cause of action for damages accrues and a person may not seek contribution or indemnity for damages incurred when wrongful death, personal injury, or injury to real or personal property resulting from the defective and unsafe condition of an improvement to real property occurs more than 20 years after the date the entire improvement first becomes available for its intended use.

The federal statute which petitioner urges preempts the Maryland statute of repose is 42 U.S.C. § 9658 which provides, in pertinent part, as follows:

§ 9658. Actions under State law for damages from exposure to hazardous substances.

(a) State statutes of limitations for hazardous substance cases

(1) Exception to state statutes

In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

(2) State law generally applicable

Except as provided in paragraph (1), the statute of limitations established under State law shall apply in all actions brought under State

law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility.

* * * *

(b) Definitions

As used in this section—

* * * *

(2) Applicable limitations period

The term "applicable limitations period" means the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this section may be brought.

(3) Commencement date

The term "commencement date" means the date specified in a statute of limitations as the beginning of the applicable limitations period.

(4) Federally required commencement date

(A) In general

Except as provided in subparagraph (B), the term "federally required commencement date" means the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.

* * * *

(Pub.L. 96-510, Title III, § 309, as added Pub.L. 99-499, Title II, § 203(a), Oct. 17, 1986, 100 Stat. 1695.)

STATEMENT OF THE CASE

Petitioner First United Methodist Church of Hyattsville ("First United") owns a building located in Hyattsville, Maryland. As part of the construction of that

building which was completed in 1962, an accoustical plaster allegedly manufactured by United States Gypsum Company ("U.S. Gypsum") was installed. One of the minor constituents of the acoustical plaster was chrysotile asbestos. At the time of the construction of First United's building, all acoustical plasters contained asbestos and this fact was well known to the people who used the products. Asbestos was a unique constituent necessary to get specific characteristics in the material so that it could be handled as a wet mortar and be applied by trowel or machine.

On June 15, 1988, 26 years after the building was first available for its intended use, First United commenced suit against U.S. Gypsum in state court in Maryland. First United claimed that the acoustical plaster was unreasonably dangerous, that the installation of the acoustical plaster had damaged its building, and that under a variety of state law causes of action, First United was entitled to recover the costs of removing and replacing the plaster. [*See* Appendix, *infra*]. U.S. Gypsum removed the suit to the United States District Court for the District of Maryland pursuant to 28 U.S.C. § 1441(a).

The governing law of Maryland provides not only statutes of limitations applicable to various causes of action, but also a statute of repose which confers upon an unlimited class of persons, including manufacturers of construction products, a substantive immunity from suit on any claim for damages or injury resulting from the defective and unsafe condition of an improvement to real property which occurs more than 20 years after the improvement first becomes available for its intended use. Md. Cts. & Jud. Proc. Code § 5-108(a).[1]

---

[1] Although a statute of repose bears some similarity to a statute of limitations, the two kinds of statutes are not the same. A statute of limitations begins to run upon the accrual of a cause of action (*i.e.*, time of injury or time of discovery) and bars a plaintiff's remedy if suit is not filed within the statutory period. A statute of

Based on this substantive statute of repose defense, U.S. Gypsum moved for summary judgment as to all claims based on the original installation of acoustical plaster.[2] First United opposed summary judgment, urging on a variety of grounds that the statute of repose was inapplicable. The last of First United's arguments was the argument that § 5-108 was preempted by 42 U.S.C. § 9658. The District Court carefully considered all of First United's arguments, found them lacking in merit and granted partial summary judgment. [*See* First United App., pp. 1a-11a]. The District Court thereafter directed the entry of a final judgment as to these claims pursuant to Fed. R. Civ. P. 54(b).

On appeal to the United States Court of Appeals for the Fourth Circuit, First United made multiple arguments that its claims were not barred by § 5-108, the last of which was preemption by 42 U.S.C. § 9658. The Court of Appeals considered all of First United's arguments and, addressing them in a unanimous opinion, affirmed the judgment of the District Court. [First United App., pp. 12a-25a]. No petition for rehearing was filed in the Court of Appeals and the petition to this Court followed.

---

repose, however, commences with a fixed event (*i.e.*, date building is first available for its intended use) and confers rights upon potential defendants if a cause of action does not accrue within the prescribed period. *See Hilliard & Bartko Joint Venture v. Fedco Systems, Inc.*, 309 Md. 147, 522 A.2d 961, 968 (1987). Under the Maryland scheme, the two defenses are complementary rather than cumulative.

[2] Part of First United's claims relate to the installation of replacement material in 1969. This aspect of First United's claims has not been addressed by the courts below and remains pending.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE QUESTION PRESENTED FOR REVIEW AS FRAMED BY FIRST UNITED IS NOT RAISED IN THIS CASE

Former Supreme Court Rule 21.1 [3] mandated that the first item in a petition for certiorari be "[t]he questions presented for review, expressed in the terms and circumstances of the case. . . ." In its zeal to present an issue that might catch the attention of the Court, First United has failed to comply with this fundamental precept. The issue which First United has framed and which underlies all of its arguments is simply not presented in this case.

Virtually all of the discussion in First United's petition revolves around whether the 1986 amendments to Section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 28 U.S.C. § 9604(a)(3), and the legislative history thereof, reflect limitations on private cost recovery actions under Section 107 of CERCLA, 42 U.S.C. § 9607. This case does not involve Section 107 of CERCLA in any way as First United did not assert a private cost recovery claim under CERCLA. [*See* Complaint set forth in the Appendix, *infra*].

This Court should not grant a petition for certiorari to review an issue which is not presented by the case.

II. THE CERCLA RELATED QUESTION THAT IS PRESENTED BY THIS CASE DOES NOT WARRANT REVIEW BY THIS COURT

Although the CERCLA question framed by First United is not presented by this case, there is an issue presented involving the 1986 amendments to CERCLA.

---

[3] First United's petition was filed on November 6, 1989, prior to the recent amendments to the Rules. This provision is now contained in Rule 14.1.

That issue is completely ignored by First United in obvious recognition that the issue does not warrant review by this Court.

The two statutory provisions relevant to the CERCLA related issue that is presented in this case were not set out verbatim in First United's petition as required by former Supreme Court Rule 21.1(f). U.S. Gypsum, however, has set forth those statutory provisions, *supra*. First United failed to set forth the applicable provisions because a mere reading of the two provisions reveals the utter sophistry of First United's CERCLA based argument in this case.

The CERCLA based argument that is presented is the assertion that 42 U.S.C. § 9658 preempts the provisions of Md. Cts. & Jud. Proc. Code § 5-108(a). Section 5-108(a) is a statute of repose, not a statute of limitations. The distinctions between a statute of limitations and a statute of repose are meaningful and were recognized by the Court of Appeals in this case:

> A statute of limitations is a procedural device that operates as a defense to limit the remedy available from an existing cause of action. *Goad v. Celotex Corp.*, 831 F.2d 508, 511 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 2871 (1988). A statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time. *Id.* Statutes of limitations are motivated by considerations of fairness to defendants and are intended to encourage prompt resolution of disputes by providing a simple procedural mechanism to dispose of stale claims. *Harig v. Johns-Manville Products Corp.*, 284 Md. 70, 75, 394 A.2d 299 (1978). Statutes of repose are based on considerations of the economic best interests of the public as a whole and are substantive grants of immunity based on a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists.

> *Whiting-Turner*, 304 Md. at 349-50, 499 A.2d 178. * * * [A] statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body. *Knox v. AC&S, Inc.*, 690 F. Supp. 752, 759 (S.D. Ind. 1988).

882 F.2d 862, 865-66 (4th Cir. 1989); First United App., p. 17a.

The 1986 amendments to CERCLA codified at 42 U.S.C. § 9658 purport to preempt state statutes of limitations *only* and do not purport to affect the substantive rights created by statutes of repose such as § 5-108(a). First United's preemption argument is patently meritless.

III. THE QUESTION OF WHETHER THE SCOPE OF CERCLA INCLUDES THE REMOVAL OF INSTALLED ASBESTOS-CONTAINING PRODUCTS IN BUILDINGS IS NOT RIPE FOR REVIEW BY THIS COURT

Aside from the reasons why this case is an improper vehicle to present the issue, the question of whether the scope of CERCLA includes the removal of asbestos-containing products is not ripe for review by this Court. This question has been addressed by only a very few courts and *all* courts which have meaningfully considered the issue have concluded that CERCLA is not applicable to an action to recover the cost of removing installed asbestos-containing products from buildings.[4]

---

[4] In addition to the views of the four judges below who have addressed the issue, CERCLA has been found inapplicable to asbestos-in-buildings cases in the following cases: *Covalt v. Carey Canada, Inc.*, 860 F.2d 1434, 1438-39 (7th Cir. 1988); *Retirement Community Developers, Inc. v. Merine*, 713 F. Supp. 153, 156 (D. Md. 1989); *Prudential Ins. Co. of America v. U.S. Gypsum*, 711 F. Supp. 1244-55 (D.N.J. 1989); *Knox v. AC&S, Inc.*, 690 F. Supp. 752, 756-57 (S.D. Ind. 1988); *3550 Stevens Creek Associates v.*

Any review by this Court of the scope of CERCLA vis-a-vis asbestos removal should await further development in the lower courts.

IV. THIS COURT SHOULD NOT ACCEPT A CASE TO REVIEW THE SCOPE OF CERCLA WHERE SUBSTANTIAL COLLATERAL CONSTITUTIONAL ISSUES WILL BE IMPLICATED

The causes of action asserted by First United are solely state law claims and U.S. Gypsum's statute of repose defense is also derived from state law. Jurisdiction of this case in the federal courts is based solely on diversity of citizenship. As this Court recently noted in *Sun Oil Co. v. Wortman*, 108 S. Ct. 2117, 2123 (1988):

> "The period sufficient to constitute a bar to the litigation of sta[l]e demands, is a question of municipal policy and regulation, and one which belongs to the discretion of every government consulting its own interest and convenience."

The Court further held that "[á] State's interest in regulating the work load of its courts and determining when a claim is too stale to be adjudicated certainly suffices to give it legislative jurisdiction to control the remedies

---

Barclays Bank of California, Civil Action No. C-87-20672—RPA (Unpublished Slip. Op., N.D. Cal., Sept. 28, 1988) (appeal pending); *School Bd. of Norfolk v. U.S. Gypsum*, Civil Action No. 86-450-N (Unpublished Bench decision, E.D. Va., Nov. 3, 1986); *Corporation of Mercer University v. Nat'l Gypsum Co.*, 24 Envt. Rep. Cas. (BNA) 1953, 1960-61 (M.D.Ga. 1986). In *Dayton Independent School District v. U.S. Mineral Products Co.*, Civil Action No. B-87-507-CA (E.D. Tex., March 11, 1989), the District Court without opinion denied a motion to dismiss the CERCLA claim in an asbestos-in-buildings case, but immediately certified the issue for interlocutory appeal to the Fifth Circuit which accepted the certification and docketed the appeal as No. 89-2734. Thereafter, in recognition of unanimous contrary authority, the plaintiff sought and was granted leave by the District Court to amend its Complaint to drop the CERCLA claim. The Fifth Circuit has not ruled on the plaintiffs' motion to dismiss the appeal as moot.

available in its courts by imposing statutes of limitations." *Id.* at 2126. State statutes of limitations reflect "the State's judgment on the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action." *Wilson v. Garcia*, 471 U.S. 261, 271 (1985). State policies of repose are not disfavored in federal law. *Board of Regents v. Tomanio*, 446 U.S. 478, 488 (1980).

If the Maryland statute of repose set forth in § 5-108 and the 1986 amendments to CERCLA codified at 42 U.S.C. § 9658 are construed such that the former is preempted by the latter, substantial constitutional questions arise under a variety of provisions, including the Tenth Amendment. Congress may not interfere with the power of the states unless such power is specifically authorized by the Constitution. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 549 (1985). There is no such constitutional authorization. In entertaining state claims, federal courts are constitutionally obligated to apply state law. *Felder v. Casey*, 108 S. Ct. 2302, 2313 (1988).

Additionally, since the immunity from suit conferred by § 5-108(a) is a substantive right which vested in 1982, any application of 42 U.S.C. § 9658 (enacted in 1986) in this case would violate due process. *See William Danzer & Co. v. Gulf & Ship Island R.R.*, 268 U.S. 633 (1925); *see also School Bd. of Norfolk v. U.S. Gypsum*, 234 Va. 32, 360 S.E.2d 325 (1987).

The substantial constitutional questions which are implicated in the circumstances of this case militate against granting certiorari to review the scope of CERCLA now.

CONCLUSION

First United has not presented special and important reasons why the Court should review this case on writ of certiorari. The petition should be denied.

Respectfully submitted,

THOMAS B. KENWORTHY *
MORGAN, LEWIS & BOCKIUS
2000 One Logan Square
Philadelphia, PA 19103
(215) 963-5702

GEORGE A. NILSON
PIPER & MARBURY
1100 Charles Center South
Baltimore, MD 21201
(301) 539-2530

Attorneys for Respondent United States Gypsum Company

January 18, 1990

* Counsel of Record

APPENDIX

APPENDIX

IN THE CIRCUIT COURT OF
PRINCE GEORGE'S COUNTY, MARYLAND

Civil Action No. CAL 88-09665

FIRST UNITED METHODIST CHURCH OF HYATTSVILLE
6201 Belcrest Road
Hyattsville, Maryland 20782,
Plaintiff,

v.

UNITED STATES GYPSUM COMPANY
101 South Wacker Drive
Chicago, Illinois 60606,
Defendant.

COMPLAINT

Plaintiff, the First United Methodist Church of Hyattsville, by its attorneys, Ashcraft & Gerel, as and for its complaint herein, avers:

NATURE OF THE ACTION

1. This action is brought by plaintiff, the First United Methodist Church of Hyattsville ("the Church"), to recover sums of money expended to remove defendant United States Gypsum Company's ("USG") asbestos-containing acoustical plaster ceiling material from its building, which is owned by the Church and is located at 6201 Belcrest Road in the City of Hyattsville, Maryland. As set forth with greater particularity below, USG manufactured, sold, and distributed to the Church in this judicial district certain asbestos-containing acoustical

plaster material, specifically for use in the construction of the Church, and in so doing misrepresented the nature of this material and failed to warn the Church of its inherently dangerous characteristics.

PARTIES

2. The Church is an non-profit organization incorporated under the laws of the State of Maryland.

3. USG is a corporation organized under the laws of Delaware with its principal place of business in Illinois and has conducted and transacted business in the State of Maryland and in this judicial district.

ALLEGATIONS COMMON TO ALL COUNTS

4. In the 1930's USG began the manufacture, sale and distribution of asbestos-containing products.

5. In 1955, USG began the manufacture of spray-applied asbestos-containing acoustical plaster products.

6. USG advertised its asbestos-containing acoustical plaster products in the Sweets Catalogue, a reference material used by architects and others involved with the design and construction of buildings.

7. Neither USG's asbestos-containing acoustical products nor its advertisements carried precautionary health warnings of any kind.

The Application of USG's Asbestos-Containing Acoustical Plaster in the Construction of the First United Methodist Church of Hyattsville

8. In or about 1961, construction of the Church building commenced.

9. Officers and agents of USG represented to the Church and its agent that its asbestos-containing acoustical plaster products were suitable and desirable for use as ceiling material in the Church.

10. Agents of USG represented to the Church's architect and agent, A. Hensel Fink, that its asbestos-containing acoustical plaster was suitable and desirable for use as ceiling material in the Church.

11. In reliance upon such representations by USG, the Church agreed to, and in fact did, employ USG's acoustical plaster material in the construction of the Church. In or about 1962, USG's asbestos-containing acoustical plaster was applied to the ceilings of the Church building by Kidwell & Kidwell Corporation, a plaster subcontractor.

12. In or about 1969, a portion of the acoustical ceiling was replaced. USG's asbestos-containing acoustical plaster was used as the replacement material.

13. By means of the acts of its agents and representatives alleged herein, USG purposefully availed itself of the privilege of conducting activities within Maryland, and

(a) contracted to supply the acoustical plaster used at the Church;

(b) transacted the business of the sale, distribution and application of acoustical plaster in Maryland, specifically for use at the Church.

14. By means of the acts of its agents and representatives alleged herein, USG committed the tortious acts herein complained of in the State of Maryland.

15. By means of the acts of its agents and representatives alleged herein, USG created and controlled a distribution system for asbestos-containing acoustical plaster, through it sought to and succeeded in delivering substantial amounts of this material for use in the State of Maryland, and thereby;

(a) reguraly did or solicited business, or engaged in some other persistent course of conduct, or de-

rived substantial revenues from goods used or services rendered in the State of Maryland, and

(b) expected or reasonably should have expected the tortious acts herein complained of to have consequences in the State of Maryland, and derived and continues to derive substantial revenue from interstate or international commerce.

COUNT I: STRICT LIABILITY

16. The Church repeats and realleges each and every allegation contained in Paragraphs 1 through 15 as if fully set forth herein.

17. USG defectively designed and manufactured the acoustical plaster applied in the Church.

18. The accoustical plaster applied in the Church was defective at the time it left the possession of USG.

19. USG's acoustical plaster was also defective and unreasonably dangerous as it was not accompanied by adequate and proper warnings.

20. USG's acountical plaster applied in the Church created an asbestos-containing dust that posed a health hazard to the occupants of the Church.

21. The presence of USG's acoustical plaster also created a health hazard to maintenance and custodial personnel and the general public who frequented the Church.

22. As a direct and proximate result of the defective, unsafe, and unreasonably dangerous condition of USG's acoustical plaster, the Church's property rights were damaged and the Church has incurred loss and damage including, *inter alia*: (a) the cost of removing and replacing USG's asbestos-containing product on its premises; and (b) the loss of the use of its building.

COUNT II: NEGLIGENCE

23. The Church repeats and realleges each and every allegation contained in Paragraphs 1 through 22 as if fully set forth herein.

24. USG willfully, recklessly and negligently sold the acoustical plaster used in the Church.

25. USG knew or should have known that its acoustical plaster was a dangerous and hazardous product and was not suitable for use in any structure.

26. USG willfully, recklessly and negligently misrepresented the inherent characteristics of its acoustical plaster and made the misrepresentations, *inter alia*, that it was desirable and suitable for use in the Church.

27. USG willfully, recklessly and negligently failed to warn or advise the Church of the dangers and hazards inherent in its acoustical plaster.

28. USG since at least the 1930's has possessed medical and scientific data which clearly indicate that asbestos and asbestos-containing materials are hazardous to the health of persons such as those who use and occupy the Church, as detailed more fully in Paragraphs 43 to and including 52, below, which paragraphs are hereby incorporated in this paragraph by reference. Prompted by a pecuniary motive, USG withheld and suppressed this medical and scientific data, depriving the Church of the opportunity to make an informed choice in selecting the acoustical plaster material for the Church.

29. USG's negligence includes its:

(a) failure properly and adequately to advise, instruct, warn, and notify the Church of the dangerous characteristics of asbestos-containing acoustical plaster;

(b) failure properly and adequately to test its asbestos-containing acoustical plaster products;

(c) failure to develop alternative acoustical products when it knew or should have known that asbestos was a disease-causing agent;

(d) failure to offer and provide the Church with alternative acoustical products which were safe and not defective; and

(e) failure to correct or remedy the conditions which were created in the Church.

30. As a direct and proximate consequence of the acts, omissions, willfulness, recklessness, and negligence of USG, the Church was compelled to expend large sums of money to remove USG's acoustical plaster from the Church, has suffered the loss of use of its property and has been otherwise injured.

COUNT III: EXPRESS WARRANTY

31. The Church repeats and realleges each and every allegation contained in Paragraphs 1 through 30 as if fully set forth herein.

32. USG expressly warranted to the Church that its asbestos-containing acoustical plaster was safe and fit for use as ceiling material.

33. The Church and its agents relied upon the aforesaid express warranties of USG.

34. USG breached its express warranties as Audicote was not fit, safe, or suitable for use in the Church.

35. In July 1987, the Church gave timely written notice of breach to USG.

36. As a direct and proximate consequence of USG's breach of its express warranties, the Church has been injured and incurred damages as more fully appears above.

COUNT IV: IMPLIED WARRANTY

37. The Church repeats and realleges each and every allegation contained in Paragraphs 1 through 30 as if fully set forth herein.

38. USG impliedly warranted that its asbestos-containing acoustical plaster was merchantable and fit for use in the Church.

39. The Church and its agents relied upon these implied warranties of USG.

40. USG breached its implied warranties as its asbestos-containing acoustical plaster was not safe, free from defects, merchantable, or fit for use in the Church.

41. As a direct and proximate consequence of USG's breach of its implied warranties, the Church has been injured and incurred damages as more fully appears above.

COUNT V: FRAUD

42. The Church repeats and realleges each and every allegation contained in Paragraphs 1 through 30 as if fully set forth herein.

43. On November 20, 1936, USG and ten other manufacturers of asbestos-containing products signed an agreement to underwrite experiments with asbestos dust to be conducted by Dr. Leroy U. Gardner, at the Saranac Laboratory, Saranac Lake, New York, a research facility which studied pulmonary disease.

44. On November 20, 1936, Vandiver Brown, General Attorney for Johns-Manville Corporation, one of the companies underwriting the Saranac Laboratory research, wrote to Dr. Gardner authorizing him to proceed with research but cautioned him that the results of the research were to be considered the property of the sponsoring companies, which companies were to determine and in what manner the research was to be made

public. The manuscript of Dr. Gardner's study (hereinafter the "Saranac Study") was to be submitted to the sponsoring companies for approval and could be published only in the event the sponsoring companies approved.

45. On February 24, 1943, Dr. Gardner sent to Vandiver Brown an outline of the then current status and findings of the Saranac Study.

46. Brown in turn provided to the other sponsoring companies a copy of the Study outline received from Dr. Gardner.

47. Dr. Gardner's Saranac Laboratory Study experiments revealed, *inter alia*, an 81.8% incidence of malignant lung tumors in mice exposed to "long-fibre" asbestos compared to 18.8% in mice exposed to other dusts. Such findings were deemed by Dr. Gardner as suggestive of the cancer-causing propensity of asbestos dust.

48. In October 1948 Saranac Laboratory sent a draft of the final Study to Brown. On October 27, 1948 Brown, in turn, provided a copy of the Study to USG and the other sponsoring companies and his suggestion that references to cancer and tumors be eliminated from the final, published Saranac Study.

49. On November 11, 1948, representatives of the eleven companies that underwrote the Saranac Study met in the Boardroom of the Johns-Manville Corporation in the City of New York.

50. USG appointed Brown as its agent representative at the November 11, 1948 meeting.

51. The representatives at the November 11, 1948 meeting concluded that all references to cancer or tumors would be omitted from the published version of the Saranac Study.

52. On March 3, 1949, Vandiver Brown wrote to USG and the other sponsoring companies to report the receipt of the revised Saranac Study, incorporating all of the omissions and changes insisted upon by the asbestos industry.

53. The report on the Saranac Study, as thus revised, was published in the January, 1951 issues of the *American Medical Association Archives of Industrial Hygiene and Occupational Medicine.*

54. USG had a continuing duty to disclose the hazards of asbestos to the Church and its agents. USG breached its duty.

55. USG actively concealed its knowledge of the hazards of asbestos from the Church.

56. The Church and its agents purchased and employed USG's asbestos-containing acoustical plaster based upon and in reliance on statements and representations of purported facts made by USG and its agents, including those averred in Paragraphs 9 and 10, above.

57. These statements and representations by USG and its agents included but were not limited to statements that USG's acoustical plaster was safe and fully tested, and suitable and desirable for use in the Church.

58. These statements and representations by USG and its agents were made for the purpose of inducing the Church and its agents to rely thereon and to purchase and use USG's product.

59. Each of the aforementioned statements and representations was false, incomplete, and untrue, was known by USG to be false, incomplete, and untrue when made, and was made with the intention to deceive and defraud the Church into purchasing and using USG's asbestos-containing acoustical plaster.

60. The Church and its agents reasonably relied upon these statements and representations in purchasing and using USG's Audicote, which they would not have done had they known that these statements and representations were false, incomplete, and untrue.

61. As a proximately result of the aforesaid fraudulent misrepresentations, the Church has been damaged as set forth above.

PRAYER FOR RELIEF

WHEREFORE, plaintiff, the First United Methodist Church of Hyattsville demands judgment against United States Gypsum Company, in an amount not presently known but estimated to be in excess of Two Hundred Twenty-Five Thousand Dollars ($225,000.00) for compensatory damages, the cost of this suit including attorneys' fees, and such other and further relief as to the Court may seem proper and just.

ASHCRAFT & GEREL

/s/ JAMES M. HANNY
James M. Hanny
2000 L Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 783-6400
Attorneys for Plaintiff

PTE:stmcb/8204A